

U.S. Department of Labor

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DATE: AUGUST 12, 1999

CASE NO.: 1999-CAA-13

IN THE MATTER OF

BRUCE DAVID MOURFIELD, II
Complainant

v.

FREDERICK PLAAS & PLAAS, INC.
Respondents

APPEARANCES:

EDWARD A. SLAVIN, JR., ESQ.

35 SE 8th Terrace
Deerfield Beach, Florida 33441
On behalf of the Complainant

DOUGLAS P. SEATON, ESQ.

Burk & Seaton
7301 Ohms Lane, Suite 320
Edina, Minnesota 55439
On behalf of the Respondent

**ORDER GRANTING RESPONDENT'S
MOTION FOR RECONSIDERATION**

This is a "whistleblower" complaint, alleging that Respondents discriminated against Complainant in violation of the employee protection provisions of a number of different federal environmental and pollution control statutes.¹ On June 1, 1999, the court issued an Order

¹ These include: Clean Air Act (CAA); Comprehensive Environmental Response, Compensation, and Liability act (CERCLA), Safe Drinking Water Act (SDWA), Solid Waste Disposal Act (SWDA), and Toxic Substances Control Act (TSCA).

on Summary Decision Motions, finding for Claimant on several issues, including whether Complainant had engaged in “protected activity” under the various statutes.² The court found that Complainant had engaged in at least one instance of protected activity by seeking out an OSHA investigator and being interviewed by him. (See June 1, 1999 Order on Summary Decision Motions, pp. 2-3). This Order was based in part on the failure of Respondents to properly address the issue in their responses.

This Order was handed down shortly before a scheduled hearing on the merits of the claim.³ However, prior to the close of the hearing, Respondents made an oral Motion for Reconsideration, and the court agreed to allow Respondents to file a written motion in support.⁴ Both parties have now filed a series of responses and replies. For the reasons explained below, the court now reverses its Order on the issue of protected activity.

In sum, Employer has argued that Complainant reported only OSHA violations, making him at most an OSHA whistleblower, not an environmental whistleblower. (See Respondents’ June 11, 1999 Memorandum in Support of Motion for Reconsideration, pp. 9-10). In addition, Respondents argue that any environmental aspect to Complainant’s reports of alleged violations is too remote and tenuous to be considered a true reasonably perceived environmental violation. (See *id.*, pp. 6-9). In response, Claimant argues he need not show any actual violation, and that he has shown reasonably perceived violations sufficient to bring him under the whistleblower protections of these environmental laws. (See Complainant’s July 30, 1999 Further Response to Plaas’ Motion to Reconsider).

Although Respondents’ written motion was not received until after the close of the hearing,⁵ the court will allow the motion to proceed because the request to allow the submission was made prior to the close of the hearing, and because it would have been difficult for Respondents to prepare and file the motion any earlier due to the short time between the issuance of the Order and the start of the hearing.

² Generally, to make a prima facie case, a claimant must demonstrate that he/she engaged in a “protected activity” under the statute, that employer was aware of the activity, that some adverse employment action was taken, and that the employment action was motivated by the protected activity.

³ This Order was dated June 1, 1999; the hearing in this matter convened June 2, 1999.

⁴ Although the court feels this motion should be resolved without reference to the transcript or exhibits as discussed below, the court notes that this motion was made and granted on the record prior to the close of the hearing. See Transcript, pp. 935-37.

⁵ The written motion is dated June, 11, 1999; it was received by the court June 16, 1999.

Claimant has suggested that since the motion was not received until after the hearing, all evidence and testimony introduced into the record may also be properly considered or noticed by the court. (See July 26, 1999 Letter). However, the court disagrees; Respondent seeks reconsideration of an Order issued prior to the hearing, and it is proper that any reconsideration be based only on evidence available at the time the original Order issued.⁶ Employer presented only new legal argument and case law in their original Motion for Reconsideration, not new facts or evidence.

29 C.F.R. § 18.40 discusses Summary Decisions, and provides that a non-moving party “may not rest upon the mere allegations or denials . . . [but] must set forth specific facts showing that there is a genuine issue of fact for the hearing.”⁷ However, even if the non-moving party fails to present such facts, summary decision is not appropriate unless the moving party is otherwise entitled to summary decision; in other words, the moving party must not only show an absence of disputed facts, but that based on the undisputed facts it is entitled to favorable judgment. (See 29 C.F.R. § 18.40 (“ . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision”); Richter v. Baldwin Assocs., 84-ERA-9 (Sec’y Mar. 12, 1986) (order of remand), slip op. at 5 n.1 (“even if complainants had not opposed [Respondent’s] motion, summary decision in favor of [Respondent] would have been inappropriate since . . . [Respondent] was not entitled to summary decision as a matter of law”)). This is essentially what Respondent has argued: that none of the conduct Complainant alleges was “protected activity” falls under the whistleblower protections of the environmental statutes. After reviewing the evidence previously presented in support of the motions, the court is persuaded that it erred in finding “no genuine issue of material fact” regarding protected activity.

Complainant initially suggested several instances of protected activity; however, in its original Order, the court focused on only one instance, Complainant’s interview with OSHA, ignoring other possible instances of protected activity. (See June 1, 1999 Order on Summary Decision Motions, pp. 2-3). Some of the other possible instances include: alleged internal complaints regarding lack of material safety data sheets (MSDS), lack of training, and a drunk co-worker (see Second Declaration of Mourfield pp. 1-2, attached to Complainant’s May 22, 1999 Response to Respondent’s Summary Judgment Motion); calling OSHA, and speaking with the investigator December 16, 1998; and a phone conversation with Plaas on December 16 in which

⁶ Although Respondents’ initial motion avoided discussion of any evidence introduced at the hearing, Complainant argued that citation to this evidence was proper, and did so in his own response. However, the court has endeavored to review only the evidence in the record prior to the commencement of the hearing in order to properly judge this as a Motion for Reconsideration.

⁷ Employer contends that while the issue of “protected activity” was not specifically argued, it was neither conceded nor waived in any of its filings. (See Respondents’ Memorandum in Support of Motion for Reconsideration, p. 1, n. 3).

he complains of being fired and of a hostile work environment.⁸ (See CX-6A, attached to Complainant's May 15, 1999 Proposed Order). In addition, Complainant has described a number of specific incidents that he claims show violation of environmental laws, such as the burning of trash by the general contractor. (See Amended Complaint, p. 6, ¶ 20). However, it is important to note that Complainant can not simply point out possible environmental violations by Employer; he must show that he somehow "blew the whistle" on these alleged or perceived violations prior to some adverse employment action (regardless of Respondents knowledge of any whistleblowing). Complainant can not simply point out violations after he was allegedly discriminated against.

After reviewing the record as it existed at the time of the motions, and considering Employer's arguments, the court is persuaded that genuine issues of material fact do exist on the issue of protected activity. For example, Claimant alleges he made internal complaints regarding a number of perceived violations; Employer disputes any such reports were ever made. (Cf. Plaas Affidavit, p. 2, ¶ 8, attached to Respondents' May 12, 1999 Motion for Summary Decision, and Second Declaration of Mourfield, pp. 1-2, ¶ 15). It is undisputed that Claimant spoke with an OSHA investigator on December 16; however, prior to the hearing, it was unknown (at least to the court) exactly what Claimant had complained of to the inspector.⁹ As a final example, Complainant alleges that the general contractor frequently burned waste material and trash at the site, thus presumably leading to a perception by Claimant that he was witnessing violations of the Clean Air Act; however, the court can find no indication in the record (as it existed at that time) as to when, if ever, Complainant made his concerns about such burning known. The timing of any action taken by Claimant to report such a perceived violation is important, because, again, the mere fact that Complainant may have witnessed violations does not mean Complainant "blew the whistle" on this activity.

Since the court has already held the hearing int this matter and the parties have presented evidence relating to Complainant's alleged "protected activities," the record is hereby closed subject to a meritorious motion to reopen said record.

It is therefore ORDERED that:

1. Respondents' Motion for Reconsideration is GRANTED, and the court's previous Summary Decision on "protected activity" is vacated;

⁸ There are other possible instances of protected activity as well, but these few suffice to demonstrate why the court is reversing its previous Order. All possible instances of protected activity will be discussed in the court's Final Recommended Decision and Order.

⁹ This is an important question. If Complainant merely complained of occupational safety concerns, for example workers who were failing to properly use personal protective gear, then he might qualify as an OSHA whistleblower, but not an environmental whistleblower.

2. The parties shall file post-hearing briefs with the court, postmarked as follows:
 - a) Complainant's brief, August 27, 1999
 - b) Respondent's brief, September 10, 1999
 - c) Complainant's Reply brief, September 17, 1999.

RICHARD D. MILLS
Administrative Law Judge

RDM:bc